Supreme Court, U.S.
FILED
NOV 20 2000
CLERK

(2)

No. 00-422

IN THE

Supreme Court of the United States

October Term, 2000

NATIONAL WHISTLEBLOWER CENTER,

Petitioner,

v.

NUCLEAR REGULATORY COMMISSION, UNITED STATES OF AMERICA and CALVERT CLIFFS NUCLEAR POWER PLANT, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION FOR RESPONDENT CALVERT CLIFFS NUCLEAR POWER PLANT, INC.

David R. Lewis
Counsel of Record
SHAW PITTMAN
2300 N Street, N.W.
Washington, DC 20037-1128
(202) 663-8474

November 20, 2000

Balmar Legal Publishing Services, Washington, DC 202-682-9800

25pp

QUESTION PRESENTED

Whether the Nuclear Regulatory Commission properly denied the National Whistleblower Center's (NWC) petition to intervene in an adjudicatory proceeding when NWC failed to meet the twice-extended deadline for filing contentions.

LIST OF PARTIES

In the court below, the National Whistleblower Center was the petitioner; the Nuclear Regulatory Commission (NRC) and the United States were respondents; and Baltimore Gas and Electric Company (BGE) intervened as a party. At that time, BGE was the owner and operator of the Calvert Cliffs Nuclear Plant, which is the subject of this litigation. After the court below issued its decision, in connection with electric industry restructuring in the State of Maryland, ownership of Calvert Cliffs was transferred to Calvert Cliffs Nuclear Power Plant, Inc. (CCNPPI), which is now the owner and licensed operator of the plant. Both BGE and CCNPPI are wholly-owned subsidiaries of Constellation Energy Group, Inc. CCNPPI, as successor in interest to BGE, is properly a respondent in this Court.

RULE 29.6 STATEMENT

Respondent Calvert Cliffs Nuclear Power Plant, Inc. has no subsidiaries. It is an indirect wholly-owned subsidiary of Constellation Energy Group, Inc., a holding company with publicly traded securities. Constellation Nuclear, LLC, is the direct parent of Calvert Cliffs Nuclear Power Plant, Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

RULE 29.6 LISTING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

ARGUMENT 8

I. THE ISSUES RAISED BY NWC ARE NOT ACTUALLY PRESENTED BY THIS CASE 8

II. THERE IS NO CONFLICT AMONG THE COURTS 15

III. THE ISSUE ACTUALLY PRESENTED HERE INVOLVES A ROUTINE PROCEDURAL RULING WITH LITTLE SIGNIFICANCE BEYOND THE PARTICULAR CIRCUMSTANCES OF THIS CASE 16

CONCLUSION 18

TABLE OF AUTHORITIES

Cases **Page**

American Farm Lines v. Black Bull Freight Serv., 397 U.S. 532 (1970) 14

BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974) 2

Burnham Trucking Co. v. United States, 216 F. Supp. 561 (D. Mass. 1963) 12

Carstens v. NRC, 742 F.2d 1546 (D.C. Cir. 1984) 14

Chemical Waste Management, Inc. v. EPA, 873 F.2d 1477 (D.C. Cir. 1989) 9

City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983) 9, 13, 15

Davis v. United States, 417 U.S. 333 (1974) 15

Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973) 14

Kenrich Petrochemicals, Inc. v. NLRB, 893 F.2d 1468 (3d Cir. 1990) 10

Marathon Oil Co. v. EPA, 564 F.2d 1253 (9th Cir. 1977) 9

Mister Discount Stockbrokers, Inc. v. SEC, 768 F.2d 875 (7th Cir. 1985) 10

NCAA v. Smith, 525 U.S. 459 (1999) 13

NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974) 14

NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170 (1981) 17

Philadelphia Newspapers, Inc. v. NRC, 727 F.2d 1195 (D.C. Cir. 1984) 10, 15

Siegel v. AEC, 400 F.2d 778 (D.C. Cir. 1968) 9, 15

Taylor v. District Engineer, 567 F.2d 1332 (5th Cir. 1978) 9

The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959) 16

Ticor Title Ins. Co. v. Brown, 511 U.S. 117 (1994) 13

Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984) ("UCS I") 10, 15

Union of Concerned Scientists v. NRC, 920 F.2d 50 (D.C. Cir. 1990) ("*UCS II*") 2, 10, 14, 15

United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972) 9, 15

United States v. Florida E. Coast Ry., 410 U.S. 224 (1973) 9

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978) 13

Statutes and Regulations

Administrative Procedure Act, 5 U.S.C. §§ 551-558 ..... *passim*

42 U.S.C. § 2231 8

42 U.S.C. § 2239 (a) 9

10 C.F.R. Part 2, Subpart G 10-12

10 C.F.R. Part 2, Subpart K 9

10 C.F.R. Part 2, Subpart L 9

10 C.F.R. Part 2, Subpart M 9

10 C.F.R. Part 2, Appendix A 12

10 C.F.R. § 2.703(b) 12

10 C.F.R. § 2.711 14

10 C.F.R. § 2.711(a) 4-5

10 C.F.R. § 2.714 ..... *passim*

10 C.F.R. § 2.715a 12

10 C.F.R. § 2.718 ..... 12, 14

10 C.F.R. §§ 2.740 – 2.744 ..... 10, 12

10 C.F.R. § 2.756 12

56 Fed. Reg. 64,943 (1991)..... 11
63 Fed. Reg. 20,663 (1998)..... 2
63 Fed. Reg. 27,601 (1998)..... 3
63 Fed. Reg. 31,813 (1998)..... 3
63 Fed. Reg. 36,966 (1998)..... 3
63 Fed. Reg. 41,872 (1998).....3-4

No. 00-422

IN THE
Supreme Court of the United States
October Term, 2000

NATIONAL WHISTLEBLOWER CENTER,
Petitioner,

v.

NUCLEAR REGULATORY COMMISSION, UNITED STATES OF AMERICA and CALVERT CLIFFS NUCLEAR POWER PLANT, INC.,
Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENT CALVERT CLIFFS NUCLEAR POWER PLANT, INC.

STATEMENT OF THE CASE

This case arises out of a proceeding before the Nuclear Regulatory Commission (NRC) to renew the operating licenses for the Calvert Cliffs Nuclear Power Plant. Petitioner National Whistleblower Center (NWC) filed a petition to intervene and request for a hearing in the proceeding. The

NRC denied the petition because NWC failed to file its contentions within the deadline set by the NRC's scheduling orders, even though the deadline had been twice extended at NWC's request.[1] Because the issues here are largely procedural in nature, it is necessary to set out the procedural history of the case in some detail.

The NRC proceeding formally began when Baltimore Gas and Electric Company (BGE)[2] filed its three-volume application to renew the Calvert Cliffs licenses on April 8, 1998.[3] The application sought to extend the licenses for an additional 20 years. The NRC published a notice in the Federal Register on April 27, 1998 stating that the application had been received and was available for public inspection. 63 Fed. Reg. 20,663 (1998). On May 19, 1998, the NRC published another Federal Register notice advising that the renewal application had been found complete and acceptable

---

[1] Under NRC procedures, a person seeking to intervene as a party in an adjudicatory proceeding must assert at least one "contention" meeting the pleading requirements of 10 C.F.R. § 2.714. The contention must consist of a specific statement of the legal or factual issue sought to be raised, along with (a) an explanation of the bases for the contention; (b) the alleged facts or expert opinions supporting the contention, together with references to the sources and documents on which the intervenor intends to rely; and (c) sufficient information to show that a genuine dispute exists with the applicant on a material issue. 10 C.F.R. § 2.714(b)(2). *See BPI v. AEC*, 502 F.2d 424, 428-29 (D.C. Cir. 1974); *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 52 (D.C.Cir. 1990) ("*UCS II*").

[2] At the time, BGE was the owner and licensed operator of the Calvert Cliffs facility. On July 1, 2000, ownership of the plant was transferred to respondent Calvert Cliffs Nuclear Power Plant, Inc. (CCNPPI), which is now the owner and licensed operator of the plant. BGE and CCNPPI are both wholly-owned subsidiaries of Constellation Energy Group, Inc.

[3] Most of the information in the application had been submitted to the NRC and was publicly available in the NRC's public document rooms in Washington and Calvert County in advance of the application. *See* Ct. App. Supp. App. at 1 (cover letter to BGE's application referencing the prior submittals, many dating to 1997 or earlier).

for docketing and that the opportunity to request a hearing on the application would be addressed in a later Federal Register notice. 63 Fed. Reg. 27,601 (1998). The NRC published a further notice on June 10, 1998 inviting public participation in the scoping process for the environmental impact statement on the renewal application. 63 Fed. Reg. 31,813 (1998). On June 24 through 26, BGE held three days of public meetings with the NRC to explain how its application had been put together and where information was located. Finally, on July 8, 1998, the NRC published its notice of an opportunity for a hearing. 63 Fed. Reg. 36,966 (1998). Interested parties were given 30 days to file a request for a hearing and a petition to intervene in accordance with NRC regulations set forth in 10 C.F.R. § 2.714.

NWC filed its petition to intervene and request a hearing on August 7, 1998, represented by counsel experienced in NRC practice and procedure. By this time, the renewal application had been available for public inspection for nearly four months. Yet NWC's petition raised no specific issues, asserting only that "a genuine dispute exists as to whether" the facility "can safely operate past the original specified lifetime" and that renewal of the operating licenses "poses an unacceptable health and safety risk to the public." Petition to Intervene, at 4.

The NRC's handling of the Calvert Cliffs proceeding was influenced by its recent Policy Statement on Conduct of Adjudicatory Proceedings, issued on July 28, 1998. 63 Fed. Reg. 41,872 (1998). In that Policy Statement, the Commission noted that it expected a growing number of proceedings in the near future on various matters, including license renewals, waste storage facility licenses, and transactions reflecting the restructuring of the electric utility industry. *Id.* at 41,873. In order to avoid unnecessary delays while maintaining a fair hearing process, the Commission provided its licensing boards with guidance and recommendations on methods of improving the efficiency of adjudicatory proceedings. Among other things, the

Commission advised that the parties should be expected to adhere to the time frames specified in the regulations and scheduling orders, and that extensions of time should be granted "only when warranted by unavoidable and extreme circumstances." *Id.* at 41,874.

On August 19, 1998, the Commission entered a case-specific order referring the Calvert Cliffs proceeding to an Atomic Safety and Licensing Board. Pet. App. 115a. The order also provided guidance to the Licensing Board on the conduct of the proceeding, drawing in part on the recently issued Policy Statement. The order established a "goal" of issuing a decision on the renewal application in about 2-1/2 years. To that end, the Commission outlined techniques by which the Licensing Board could "ensure prompt and efficient resolution of contested issues." Pet. App. 119a. Like the Policy Statement, the order provided that "the Licensing Board should not grant requests for extensions of time absent unavoidable and extreme circumstances." Pet. App. 121a. The order cautioned the Licensing Board, however, not to "sacrifice fairness and sound decision-making to expedite any hearing granted on this application." Pet. App. 119a.

On August 20, 1998, the Licensing Board issued its Initial Prehearing Order setting a schedule and establishing certain procedures to be followed in the case. *See* Ct. App. JA at 42-54. NWC was ordered to file its contentions meeting the requirements of 10 C.F.R. § 2.714 on or before September 11, 1998, and a prehearing conference was scheduled for the week of October 13, 1998.

NWC reacted with a two-pronged attempt to delay the proceedings. First, NWC moved the Commission to vacate its August 19 order, arguing that the 2-1/2 year completion goal and other schedule milestones were improper and that the "unavoidable and extreme circumstances" test was inconsistent with an existing regulation, 10 C.F.R. § 2.711(a), allowing extensions of time for "good cause." The Commission denied NWC's motion, relying on its traditional authority to establish case-specific schedules and procedures,

and explaining that the "unavoidable and extreme circumstances" standard "simply gives content, under the circumstances of this case, to our rule's general 'good cause' standard" in § 2.711(a). Pet. App. 110a, n.5. The Commission reiterated its expectation that the Licensing Board would "prevent unnecessary delays and digressions, but at the same time ... ensure a fair and meaningful process." Pet. App. 104a.

The second prong of NWC's attack was a motion to the Licensing Board to postpone the prehearing conference to December 1998, and to allow the filing of contentions up to 15 days before the conference. The net result of the motion would have been more than a two-month delay in the schedule. The Licensing Board, on August 27, 1998, denied the motion because NWC had made no showing why it was unable to formulate contentions in the four-month period that had elapsed since the renewal application was filed. The Board concluded, therefore, that NWC had not shown the requisite unavoidable and extreme circumstances for a schedule extension. Pet. App. 100a. NWC appealed the Licensing Board's ruling to the Commission and argued that it "should have had, under the current schedule before the Board, until September 30, 1998 to make the required filings and to further address matters related to standing, contentions and other issues relevant to its right to participate in this proceeding ...." NWC's Petition for Review, Sept. 11, 1998, at 6-7. *See* Pet. App. 8a, 16a. The Commission disagreed with NWC's analysis, but nevertheless extended the deadline for contentions to September 30 as a matter of discretion in order "[t]o ensure that NWC has an adequate opportunity to introduce matters of safety or environmental concern into the Calvert Cliffs proceeding." Pet. App. 95a. NWC therefore obtained precisely the extension it requested.[4]

---

[4] The deadline was later extended by one more day at NWC's request because of a religious holiday. *See* Ct. App. JA at 74-78.

Thus the ultimate deadline for contentions – October 1, 1998 – gave NWC nearly six months to review the renewal application and formulate its contentions. Yet on October 1, NWC filed no contentions, nor did it seek a further extension of the deadline. Instead, NWC filed an assortment of other pleadings which made it clear that NWC did not intend to comply with the deadline for submitting contentions.[5] NWC apparently had second thoughts about its strategy, and on October 13, 1998, it submitted a "Notice of Filing" containing two purported contentions. NWC made no attempt, however, to show that it satisfied the criteria for late-filed contentions set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v). Nor did the contentions provide sufficient detail to meet the basis and specificity requirements of 10 C.F.R. § 2.714(b)(2).

Given NWC's failure to meet the October 1 deadline, the Licensing Board denied its petition to intervene. Pet. App. 77a. The Commission affirmed in a comprehensive opinion on December 23, 1998. Pet. App. 47a. The Commission concluded that the scheduling orders were proper and that NWC had no excuse for ignoring them. Pet. App. 60a-63a. The Commission again explained that the "unavoidable and extreme circumstances" test was a reasonable construction of the general "good cause" standard. Pet. App. 58a. The Commission also concluded that the dispute was largely academic because NWC had never made a showing that would have satisfied *any* meaningful interpretation of the "good cause" standard. Pet. App. 59a. The extensions granted to NWC were purely a matter of discretion and not the result of any "good cause" showing by NWC. Finally, the Commission found that NWC's untimely contentions were

---

[5] NWC's pleadings are described in the Commission's opinion affirming the denial of NWC's intervention petition. Pet. App. 51a-52a. One of the documents listed "areas of concern" but explicitly stated that it was "not intended to be a filing of contentions or basis for the contentions." NWC's Status Report dated October 1, 1998, at 10 (emphasis in original).

impermissibly vague and failed to meet the established pleading requirements of 10 C.F.R. § 2.714(b). Pet. App. 69a-73a. Thus, even if the Commission had been willing to overlook the missed filing deadline, NWC's petition to intervene still would have been denied for failure to proffer any litigable contentions.

NWC sought review of the Commission's decision in the court of appeals. The original panel found in favor of NWC in a 2-1 decision written by Circuit Judge Wald and issued on November 12, 1999. Pet. App. 24a. Judge Williams dissented, but the majority opinion was issued without waiting for the dissent. *See* Pet. App. 25a n.1. A few days later, Judge Wald left the bench. On November 22, 1999, the two remaining panel members entered a *sua sponte* order vacating the court's judgment and majority opinion. Chief Judge Edwards (who originally concurred with Judge Wald) explained that "the original (now vacated) majority opinion fails to address some critical issues ... that ... were lost in our haste to issue an opinion before our colleague, Judge Wald, departed from the court." Pet. App. 21a.[6]

Another judge was selected to replace Judge Wald, and the case was rebriefed and reargued. The court issued its decision on April 11, 2000, sustaining the Commission's decision and rejecting NWC's appeal, in a unanimous opinion written by Chief Judge Edwards. Pet. App. 1a. The court held that the NRC acted well within its authority in adopting the "unavoidable and extreme circumstances" test and in setting schedules and deadlines for the proceeding. Pet. App. 10a-15a. The court also held that NWC suffered no cognizable harm from the NRC's alleged errors. The "unavoidable and extreme circumstances" test was applied only once – in the Licensing Board's August 27, 1998 order

---

[6] NWC's certiorari petition is rife with citations to and quotations from Judge Wald's opinion, often without identifying the source or warning the reader that the source is a vacated opinion. *See, e.g.*, Pet. 4, 5, 8, 9, 10, 15, 16.

denying NWC's initial motion for an extension of time. However, the Commission reversed that order and gave NWC an extension to the date NWC itself proposed. Pet. App. 16a. Moreover, NWC never made any showing that would satisfy even the "good cause" test for a further extension of time. Pet. App. 4a, 17a. Given the lack of any real prejudice to NWC, the court of appeals aptly observed that "this case appears to be much ado about nothing." Pet. App. 16a.

ARGUMENT

NWC attempts to justify certiorari by formulating legal issues concerning the interplay between the hearing requirements of the Administrative Procedure Act (APA) and the Atomic Energy Act (AEA). Those issues, however, are not actually presented by this case and were not decided (or even mentioned) by the court below. Moreover, the conflict in court decisions asserted by NWC simply does not exist. The issue *actually* presented by this case turns on a routine procedural ruling concerning scheduling in a specific case that will have little or no significance beyond the particular circumstances of this case. The case is all the more unsuitable for review here because NWC suffered no real prejudice from the procedural decision of which it complains.

I. THE ISSUES RAISED BY NWC ARE NOT ACTUALLY PRESENTED BY THIS CASE

NWC's petition focuses primarily on its Issues Nos. 1 and 2, which ask this Court to decide whether the NRC is bound to follow the formal hearing procedures of the APA, 5 U.S.C. §§ 551-58. These issues are irrelevant, and are not presented in this case, because the NRC applied its formal hearing procedures in the proceeding below, and these procedures exceed the APA's requirements.

There is no dispute that, as a general matter, the APA applies to the NRC. Indeed, § 181 of the AEA so provides. 42 U.S.C. § 2231. The question that NWC seeks to raise is

whether the APA's formal hearing requirements in 5 U.S.C. §§ 556 and 557 apply to NRC licensing proceedings. Under § 554(a), those provisions only apply to agency adjudications that are "required by statute to be determined on the record after opportunity for an agency hearing."[7] As this Court has explained, §§ 556 and 557 need be applied "only where the agency statute, in addition to providing a hearing, prescribes explicitly that it be 'on the record.'" *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972) (quoting *Siegel v. AEC*, 400 F.2d 778, 785 (D.C. Cir. 1968)). *See also United States* v. *Florida E. Coast Ry.*, 410 U.S. 224, 237-38 (1973) (agency statute with phrase "after hearing" not sufficient to trigger APA §§ 556 and 557).[8]

The controlling agency statute in question here is section 189(a) of the AEA, 42 U.S.C. § 2239(a), which requires the NRC under certain circumstances to "grant a hearing" but does not expressly provide for a hearing "on the record." In certain types of proceedings governed by AEA § 189(a), the NRC has adopted informal hearing procedures that would not necessarily satisfy all of the formal APA hearing requirements. *See, e.g.*, 10 C.F.R. Part 2, Subpart K (expansion of spent fuel storage capacity), Subpart L (materials licenses), and Subpart M (license transfers).[9] When

---

[7] NWC also cites 5 U.S.C. § 558(c), but it is now well established that § 558(c), in and of itself, does not trigger any hearing requirements. *See, e.g., City of West Chicago v. NRC*, 701 F.2d 632, 644 (7th Cir. 1983); *Taylor v. District Engineer*, 567 F.2d 1332, 1337 (5th Cir. 1978); *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1260 n.25 (9th Cir. 1977).

[8] In the *Allegheny-Ludlum* and *Florida East Coast* cases, the Court was discussing the parallel triggering provision in APA § 553 relating to rulemaking, but the analysis is equally applicable to § 554. *See Chemical Waste Management, Inc. v. EPA*, 873 F.2d 1477, 1481-82 (D.C. Cir. 1989) (statute requiring "hearing" in an adjudication does not necessarily require formal APA "on the record" procedures).

[9] The Seventh Circuit has held that, at least with respect to a materials license proceeding, the NRC is not required to follow the APA's formal hearing requirements. *City of West Chicago v. NRC*, 701 F.2d at 641.

it comes to licensing proceedings for nuclear power plants, however, the NRC has always applied its most formal adjudicatory procedures found in Subpart G of Part 2. *See Philadelphia Newspapers, Inc. v. NRC*, 727 F.2d 1195, 1202-03 (D.C. Cir. 1984) (describing NRC's practice). And the NRC's Subpart G procedures are even more formal and rigorous than the formal APA procedures. *Compare* 10 C.F.R. §§ 2.740-2.744 (providing for discovery in Subpart G proceedings), *with Kenrich Petrochemicals, Inc. v. NLRB*, 893 F.2d 1468, 1484 (3d Cir. 1990) (APA does not confer a right to discovery); *Mister Discount Stockbrokers, Inc. v. SEC*, 768 F.2d 875, 878 (7th Cir. 1985) (same). As the court below explained in another case, "the Commission's regulations governing licensing proceedings provide for hearing procedures that comport with or even surpass those required by the APA for 'on the record' adjudication." *Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1445 n.12 (D.C. Cir. 1984) (*"UCS I"*).

Since the Subpart G procedures are more formal than those of the APA, the courts have not found it necessary to decide, as a theoretical matter, whether the APA formal hearing procedures might also be applicable in a power plant licensing case where the NRC is already applying its formal Subpart G procedures. The issue has surfaced occasionally, but there has been no need to resolve it because it would have had no bearing on the outcome of the case at hand. *See UCS II*, 920 F.2d at 54 n.3 (issue need not be resolved); *UCS I*, 735 F.2d at 1445 n.12 (court refrains from deciding issue); *Philadelphia Newspapers*, 727 F.2d at 1203 (issued not reached because NRC in fact applying formal procedures). The question is simply a moot point.

The NRC applies these formal Subpart G procedures to nuclear power plant license renewal proceedings, just as it does in the initial licensing of a plant. In its rulemaking proceeding establishing the license renewal process, the NRC considered what type of procedures should apply in license renewal cases, taking into account, among other things, the

memorandum from its General Counsel upon which NWC places such heavy reliance. Pet. App. 136a. The General Counsel recommended that license renewal cases should probably include some sort of formal hearings. Pet. App. 175a. He went on, however, to qualify his opinion as follows:

> That the NRC may decide to require formal, on-the-record license renewal hearings does not mean that such hearings must be conducted under the procedures of 10 C.F.R. Part 2, Subpart G, Rules of General Applicability. As noted above, it is well-recognized that the NRC's rules of practice go well beyond the procedural requirements of the APA. For example, nothing in the APA requires the extensive discovery provided for in 10 C.F.R. 2.740 through 2.744.

Pet. App. 175a. NWC argues that the General Counsel's opinion "should not be disregarded." Pet. 13. In fact, the NRC did not disregard that opinion, but went beyond it and adopted the full panoply of Subpart G procedures for license renewal cases. 56 Fed. Reg. 64,943, 64,966 (1991) (adopting 10 C.F.R. Part 54 to govern license renewals and stating that all hearings would be conducted in accordance with Subpart G).

By virtue of Subpart G, NWC got all of the procedural protections of the APA, and more. Indeed, one searches NWC's petition in vain for any material APA procedural right that it was deprived of under Subpart G. The only APA provisions cited by NWC are §§ 554(b)(3) and 558(c). *See* Pet. 15-16. NWC relies on the provision in § 554(b)(3) requiring that "[i]n fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives." In § 558(c), NWC points to the phrase requiring agencies to conduct proceedings "with due regarding for the rights and privileges of all the interested

parties or adversely affected persons." [10] Neither of these provisions gives NWC anything more or different than the procedural protections of Subpart G. For example, 10 C.F.R. § 2.703(b) is in substance identical to the APA. It provides that "[t]he time and place of hearing will be fixed with due regard for the convenience of the parties or their representatives, the nature of the proceeding, and the public interest." The same philosophy is reflected throughout the NRC's Subpart G procedures. *See, e.g.*, 10 C.F.R. § 2.715a (consolidation permitted unless it "would prejudice the rights of any party"); § 2.718 (presiding officer must "conduct a fair and impartial hearing" and is directed to comply with 5 U.S.C. §§ 551-558); § 2.740(d) (discovery orders must consider "convenience of parties and witnesses"); § 2.756 (informal procedures encouraged if consistent with 5 U.S.C. §§ 551-558); App. A, ¶ I(b) (in fixing time and place of conferences, "due regard shall be had for the convenience and necessity of the parties").

In this case, NWC enjoyed procedural protections under Subpart G surpassing those provided by the APA. Accordingly, there was no need for the court below to decide whether the less formal provisions of the APA might also apply. That was a purely academic question immaterial to the outcome of the case. The court of appeals did not decide the issue and indeed did not even mention it. This Court does not ordinarily consider immaterial issues that were never

---

[10] These provisions are so general in nature that they are little more than platitudes which every adjudicatory body no doubt would embrace. That presumably explains why the provisions have rarely been applied by the courts to assess the validity of agency action. One such case (and perhaps the only one) is *Burnham Trucking Co. v. United States*, 216 F. Supp. 561 (D. Mass. 1963) (3-judge court), in which the statutory predecessor of § 554(b)(3) was applied to sustain the agency's refusal to postpone a scheduled hearing. The court correctly observed that the matter of continuances lies within the agency's discretion and will not be disturbed except upon a "clear showing of abuse." 216 F. Supp. at 564 (citation omitted).

addressed in the court below. *See NCAA v. Smith*, 525 U.S. 459, 470 (1999); *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121-22 (1994). There may be some case in which it really matters whether the APA hearing procedures apply to an NRC adjudication.[11] This is not such a case.[12]

Issue No. 3 raised by NWC attacks the NRC's construction of the "good cause" criteria in 10 C.F.R. § 2.711 to require "unavoidable and extreme circumstances." This issue, like the others, is not actually presented here because, as the court below held, the "unavoidable and extreme circumstances" test never caused any prejudicial injury to NWC. Pet. App. 16a-17a. The Commission reversed the only application of that standard and, as a matter of discretion, gave NWC precisely the extension it sought. Pet. App. 94a. Since the new standard was never applied, its validity is at most a theoretical abstraction unsuitable for review here. Moreover, the adoption of the new standard is also immaterial in this case because NWC never made any showing that would have satisfied even the "good cause" standard, as both the Commission (Pet. App. 59a) and the court of appeals (Pet. App. 4a) held. Thus, NWC's third issue is, on the facts of this case, purely academic.

---

[11] It might make a difference in a materials license case, for example, because the NRC uses less formal procedures in such cases. That is why the Seventh Circuit found it necessary to decide the APA question in the *City of West Chicago* case.

[12] NWC argues that the present case is important in light of *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). Pet. 11, 14. *Vermont Yankee* is of no help to NWC. That case held that the courts may not impose procedures on administrative agencies that go beyond statutory requirements. The Court did not address the question of when agencies are subject to the APA's formal hearing requirements. *Vermont Yankee* is relevant, however, insofar as it makes clear that intervenors have a duty to participate cooperatively in NRC proceedings, and to present their contentions clearly and understandably. 435 U.S. at 553-54.

Finally, even if the third issue were presented, it would still be an unlikely candidate for Supreme Court review, given that it involves a routine application of settled principles of administrative law. The court of appeals was clearly correct when it sustained the Commission's adoption and application of the "unavoidable and extreme circumstances" standard. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294-95 (1974). It is beyond dispute that the NRC has broad discretion to set schedules and control its cases. The Commission's regulations expressly give its Licensing Boards that authority. *See* 10 C.F.R. §§ 2.711, 2.718. It is also clear that the NRC, like any administrative agency, always has inherent power to "modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it." *American Farm Lines v. Black Bull Freight Serv.*, 397 U.S. 532, 539 (1970). *See also Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 762 (1973) (courts should not "unduly limit the discretion the Commission must have in order to mold its procedures to the exigencies of the particular case.") The agency's discretion necessarily extends to matters of scheduling and docket control. As the court of appeals held in *UCS II*, the NRC "can certainly adopt a pleading schedule designed to expedite its proceedings." 920 F.2d at 55. And it is recognized that the NRC has broad authority to "to control its own proceedings" and to set and enforce deadlines even where they result in what an intervenor may consider to be "a truly impossible schedule." *Carstens v. NRC*, 742 F.2d 1546, 1559 (D.C. Cir. 1984).

The lower court carefully analyzed the issues and concluded that the NRC acted properly in all respects when it adopted the "unavoidable and extreme circumstances" test as a case-specific refinement of the good cause standard; that NWC was on clear notice of the refined test; and that the agency action here was neither arbitrary nor capricious. Pet. App. 10a-15a. The procedural orders in this case were well within the NRC's discretion. NWC cites no case anywhere in its petition suggesting that the lower court's analysis was

incorrect, and indeed the third issue is barely addressed in the petition. Certiorari is unwarranted.

II. THERE IS NO CONFLICT AMONG THE COURTS

NWC argues that there are "troubling ambiguities" and "conflicting decisions" among the courts and the NRC on the APA issues discussed above. Pet. 18-23. In fact, there is no such conflict, as the four cases cited by NWC demonstrate.

The *City of West Chicago* case (Pet. 19) held that the APA's formal hearing requirements are not applicable in a materials license proceeding. 701 F.2d at 641-45. No other case has held to the contrary. *Siegel* (Pet. 19) held that the APA does not require an adjudicatory hearing when the NRC conducts a rulemaking. 400 F.2d at 785-86. That holding remains uncontradicted and was cited with approval in this Court's *Allegheny-Ludlum* opinion, 406 U.S. at 757, and in the D.C. Circuit's later *Philadelphia Newspapers* opinion, 727 F.2d at 1203. *UCS I* (Pet. 20-21) found it unnecessary to decide whether the APA's formal hearing requirements apply to power plant licensing proceedings, given that the NRC's own procedures meet or exceed APA requirements. 735 F.2d at 1445 n.12. *UCS II* reached the same conclusion for the same reason. 920 F.2d at 53 n.3. *UCS I* and *UCS II* do not conflict with each other, nor with any of the other cases cited by NWC. And it bears repeating that *this* case certainly does not create a conflict because it did not address the issue at all. There simply is no conflict.[13]

NWC also complains that a footnote in one NRC opinion is inconsistent with the courts' decisions. Pet. 18, 23-25. In that footnote (Pet. App. 60a n.4), the Commission was responding to NWC's argument that the APA required the NRC to give due regard to the "rights and privileges" and the

---

[13] Even if there were some sort of a conflict among *Siegel*, *UCS I*, *USC II* and this case, it would be an intracircuit conflict best resolved by the D.C. Circuit itself. *See Davis v. United States*, 417 U.S. 333, 340 (1974).

"conveniences and necessities" of the parties. The Commission readily conceded its "obligation to treat all parties to our proceedings fairly." The Commission also went on to point out, "as a formal matter," that it took the position that its licensing proceedings are not governed by the APA requirements for formal hearings. The Commission's aside on this legal issue was not the rationale for its decision and had no bearing on the outcome of the case. It hardly merits Supreme Court review, especially where there is no conflict among the courts on the issue and NWC was actually accorded formal procedures surpassing those of the APA. *See The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) (conflicts should be resolved only "in the context of meaningful litigation," not when issue is posed "abstractly").

III. THE ISSUE ACTUALLY PRESENTED HERE INVOLVES A ROUTINE PROCEDURAL RULING WITH LITTLE SIGNIFICANCE BEYOND THE PARTICULAR CIRCUMSTANCES OF THIS CASE

The issue actually presented here is whether the NRC properly denied NWC's intervention petition when it failed to file its contentions by the prescribed deadline. The issue turns on the particular facts and circumstances of the case and will have little or no impact on other NRC cases or on administrative law in general. NWC nevertheless claims that the case is important because it is the first license renewal case and may set a precedent making it difficult for intervenors to participate meaningfully in other such cases. Pet. 17-18. The record does not support NWC's claim.

The schedule in this case gave NWC an ample opportunity to participate meaningfully in the proceedings. NWC had 176 days from the filing of the renewal application to the contention deadline. That was more than enough time for a diligent intervenor to review the application, retain any necessary experts, and formulate contentions. And it should

be kept in mind that NWC was not required to submit and prove its entire case at the end of the 176-day period. It was merely required to file contentions at that time. After that, there would have been a period of 6-12 months for further prehearing procedures, including discovery; completion of the NRC Staff's Safety Evaluation Report and Final Environmental Statement; submission of additional contentions based on the Staff reports; and preparation of testimony and evidence for the evidentiary hearing. *See* Pet. App. 120a. This was not a rush to judgment, but a deliberate process expected to take 2 ½ years.

The Commission held as a matter of fact that NWC had ample time to develop contentions (Pet. App. 63a), and the court of appeals agreed (Pet. App. 13a-14a).[14] There is no need for a further review of that factual determination in this Court. *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981). Nor is it plausible that the result in this case will adversely affect public participation in other renewal cases. Other intervenors in other cases will have no cause for complaint if they are treated exactly the same as NWC.

Another singular feature of this case is that when NWC eventually filed contentions well after the deadline, they proved to be so vague and insubstantial that they failed to meet the NRC's pleading requirements. The Commission so held. Pet. App. 69a-73a. Even if the Commission had overlooked the untimeliness, NWC still would have been denied intervention for failure to submit admissible contentions. This is an alternative ground for affirmance independent of the schedule-related issues that NWC seeks to raise in this Court. Accordingly, review of the issues tendered

---

[14] The court also pointed out that NWC had ample time if counted from the July 8, 1998 notice of opportunity for hearing. From that point, NWC had 85 days, compared to the normal 75-day default period that would apply under NRC procedures in the absence of a scheduling order. Pet. App. 13a.

by NWC would likely be futile because the alternative ground which NWC has not asked the Court to review – would still require affirmance of the judgment below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

David R. Lewis
Counsel of Record

SHAW PITTMAN
2300 N Street, N.W.
Washington, D.C. 20037-1128
Telephone: (202) 663-8474

Attorney for Respondent
Calvert Cliffs Nuclear Power Plant, Inc.

November 20, 2000